USA v. Hughes, No. 06-10615

W. FLETCHER, Circuit Judge, dissenting in part:

I dissent from the panel's memorandum disposition solely on the issue of the district court's response to the jury inquiry. I would reverse Hughes's conviction on Count Three.

The verdict form for Count Three asked the jury to determine whether Hughes was guilty of "attempted production of a biological toxin (ricin) for use as a weapon." *See* 18 U.S.C. § 175(a). Jury Instruction 16 listed the elements for Count Three. The instruction stated, in relevant part: "To attempt to produce a toxin with the intent to 'use as a weapon' means to attempt to produce a toxin with the intent to use it to injure or harm another person or persons. . . . The term 'use as a weapon' does not include the attempted production of toxin for a peaceful purpose." The parties do not dispute the correctness of this instruction.

Less than two hours after the jury began its deliberations, the jury submitted a note to the court asking, "What is the DEFINITION OF A WEAPON UNDER LAW?" Meeting outside of the presence of the jury to discuss the note, counsel for both sides suggested that the court refer the jury back to the instructions. Then, the court on its own initiative suggested providing a more detailed response: "I would suggest that, the definition requested is not a consideration in this case. Please

refer to the instructions for – instructions regarding this case."

The prosecution voiced no objection, but Hughes's attorney responded, "Well, actually the definition requested is an issue in this case." The court disagreed: "It is not one of the issues in any of those instructions, what a weapon is under law. That's not a definition that they have to consider. They've got what they have to consider." Hughes's attorney repeated her concern: "Judge, I agree they have it in their instructions. However, it is an issue, specifically in Count 3." The court responded that "a weapon under law is not a definition which is at issue." Hughes's attorney renewed her request that the court limit its response to "please refer to your instructions." The court responded by saying, "I'm going to give what I give. Again, you know, jurors that want to become lawyers are not – and it's not relevant. The instructions tell them what the law is. . . . As a matter of fact, I went back and cautiously looked at the instructions, and I didn't see any reference to, quote, weapons under law, unquote." The court then wrote its response on the jury note as follows: "This definition is not an issue in this case. Please refer to the Court's instructions."

"We generally review for abuse of discretion a district court's response to a juror inquiry. However, we review de novo whether a jury instruction correctly states the law, and whether an instruction violates due process." *United States v.*

Verduzco, 373 F.3d 1022, 1030 n.3 (9th Cir. 2004) (citations omitted).

In reviewing a court's response to a jury inquiry, "we may infer from questions asked by the jury that it was confused about a controlling legal principle. If that is the case, we inquire into whether the trial court, by its responses or supplemental instructions, eliminated that confusion." *United States v. Walker*, 575 F.2d 209, 213 (9th Cir. 1978). "[T]he district court has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue." *United States v. Hayes*, 794 F.2d 1348, 1352 (9th Cir. 1986). "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946); *see also United States v. Martin*, 274 F.3d 1208, 1210 (8th Cir. 2001) ("When a jury explicitly requests supplemental instruction, a trial court must take great care to insure that any supplemental instructions are accurate, clear, neutral, and non-prejudicial." (internal quotation marks omitted) (quoting *United States v. Beckman*, 222 F.3d 512, 521 (8th Cir. 2000))). In fulfilling this obligation, trial courts must use "particular care and acumen." *Verduzco*, 373 F.3d at 1031. Courts have recognized the propriety of providing supplemental instructions "in response to the jury's specific inquiry and for the purpose of clarifying legalistic terms to a lay jury." *Burrup v. United States*, 371 F.2d 556, 559 (10th Cir. 1967). A court may

abuse its discretion where it "may have misunderstood the jury's question and therefore responded too narrowly," rather than "simply direct[ing] the jury's attention to the totality of the instructions." *Arizona v. Johnson*, 351 F.3d 988, 996 (9th Cir. 2003) (discussing *Powell v. United States*, 347 F.2d 156 (9th Cir. 1965)). "The ultimate question is whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors." *Walker*, 575 F.2d at 213 (internal quotation marks omitted) (quoting *Powell*, 347 F.2d at 158).

I would hold that the court's statement that "[t]his definition is not an issue in this case" was sufficiently misleading as to require reversal of the jury's guilty verdict on Count Three. The jury's question strongly suggests that the jury was confused by a controlling legal principle – namely, whether and how a biological toxin might be created "for use as a weapon." *See Walker*, 575 F.2d at 213; *cf. United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994) (noting that an object may be a dangerous weapon per se, based solely on the object's latent capabilities, or it may be a dangerous weapon based on the manner of its use). Count Three of the Verdict Form required the jury to determine whether the prosecution had proven beyond a reasonable doubt that Hughes had attempted to produce "a biological toxin (ricin) for use as a weapon." Jury Instruction 16, which does not

define "weapon," but does define "use as a weapon," should have resolved that confusion.

The jurors undoubtedly were familiar with the ordinary definition of weapon. *See, e.g.*, Webster's Third New International Dictionary 2589 (1993) (defining weapon as "an instrument of offensive or defensive combat"). The verdict form, however, used the word in an unfamiliar context. The jurors' question indicated that they understood that ricin could not be used as a weapon in the ordinary sense of a knife, gun or club, and that they wanted to know the legal definition of the term applicable in the case against Hughes. That is, their inquiry about the "definition of a weapon under law" was a request to the court to provide the legal definition relevant to this case. *Cf. United States v. Rios-Calderon*, 80 F.3d 194, 196 (7th Cir. 1996) (discussing a jury note requesting "a definition of the words 'entrapment' and 'ensnarement' as it pertains to the law").

If a jury indicates that it is confused by an instruction, we must determine "whether the trial court, by its responses or supplemental instructions, eliminated that confusion." *Walker*, 575 F.2d at 213. A trial judge responding to a jury inquiry must take into account the context from which the inquiry has arisen. *See, e.g.*, *Bollenbach*, 326 U.S. at 612; *Powell*, 347 F.2d at 157-58; *see also Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1571 (Fed. Cir. 1986) (noting that the trial

court must consider a jury's query "in context," recognizing that the question may be "a reasonable shorthand or lay manner of asking" a relevant question). The district court disregarded the context in which the question was posed and failed to recognize the likelihood that the jurors were asking for a legal definition of the term "weapon" applicable to Count Three. Rather than eliminating the jury's confusion about the proper definition of "weapon," the district court's response, at the very least, failed to clear up the confusion. In fact, it did something worse: it improperly directed the jury to ignore a critical and disputed element of Count Three. The jury instructions, as supplemented by the court's response to the jury's question, were "such as to confuse or leave an erroneous impression in the minds of the jurors." *United States v. Petersen*, 513 F.2d 1133, 1136 (9th Cir. 1975) (internal quotation marks omitted) (quoting *Powell*, 347 F.2d at 158).

The district court's error was not harmless. The court's answer – that the requested definition of "weapon under law" "is not an issue in this case" – in effect directed the jury to strike the last five words from Count Three and to relieve the prosecution of the burden of proving that Hughes had intended to produce the ricin for the purpose of harming others. This element of Count Three was the weakest aspect of the government's case. The government had presented no evidence that Hughes had ever harmed anyone in the past or that he had ever even expressed any

motive or desire to harm anyone. Indeed, the government's expert testified that ricin has legitimate, non-criminal uses. The jury, lacking the requisite legal training to parse its own question and the court's response, most likely interpreted the court's statement to mean that there was no issue in the case regarding whether Hughes, if he did in fact attempt to produce ricin, actually intended to use it as a weapon. *See Bollenbach*, 326 U.S. at 612 ("The influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." (internal quotation marks and citation omitted) (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894))). The answer therefore prejudiced Hughes. *See id.* ("If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."); *United States v. Southwell*, 432 F.3d 1050, 1053 (9th Cir. 2005); *cf. Walker*, 575 F.2d at 214.

The conclusion that the trial court abused its discretion follows from our decision in *United States v. Petersen*, 513 F.2d 1133. There, the defendant was charged with embezzlement of property of the United States and conspiracy to defraud. *Id.* at 1134. The judge had instructed the jury at least twice regarding the meaning of the word intent, and in response to a note from the jury asking whether

"ignorance of the law [is] any excuse," the judge responded in writing that "ignorance of the law is not an excuse." *Id.* at 1135. We held that the response to the jury inquiry was "erroneous, misleading and contradictory," because ignorance of the law was relevant "in determining whether there existed the specific intent necessary for a violation of the law charged." *Id.* The court found that "[w]hile the principle has often been stated by the courts that ignorance of the law is no excuse, its use in the circumstances of this case was at least misleading to the jury" and "may have caused the jury to eliminate it as a factor affecting specific intent." *Id.* The court found that even if the instruction was not "clearly incorrect," it was "at least misleading on a vital issue in the case." *Id.*

We have previously recognized that "[f]ailure to provide the jury with a clarifying instruction when it has identified a legitimate ambiguity in the original instructions is an abuse of discretion." *See Southwell*, 432 F.3d at 1053. Our conclusion should be no different when the jury instructions are clear, but a jury's inquiry demonstrates juror confusion and the court's response creates a palpable risk that the jury will disregard those instructions and mis-apply the law.

I would therefore reverse Hughes's conviction on Count Three.